Framework Legislation and Federalism
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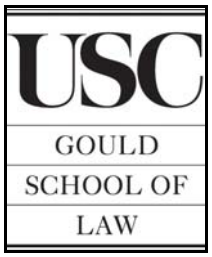

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Framework Legislation and Federalism

Elizabeth Garrett[*]

In *Separation of Powers as a Safeguard of Federalism*,[1] Bradford Clark identifies the Supremacy Clause as a powerful protection of principles of federalism because it allows federal action only if the "precise procedures" for lawmaking are followed. He describes the requirements of bicameralism, presentment and, in the case of some federal actions, supermajority votes, and he emphasizes the Senate's role in policymaking. The Senate has historically been the arena in which states have significant influence; although that influence has decreased after passage of the Seventeenth Amendment, the rule of equal representation of states in that body continues. Throughout the article, Professor Clark quotes the Supreme Court's description of the constitutional procedures governing lawmaking as "finely wrought and exhaustively considered."[2] The Constitution's mandates with respect to congressional procedures, however, are also relatively sparse; most of the procedures governing lawmaking in the House and Senate are part of the internal rules of each body adopted pursuant to Article I, Section 5 of the Constitution, the Rules of Proceeding clause. No analysis of the "finely wrought" procedures of lawmaking is complete without an assessment of these additional requirements. Moreover, the adoption of framework laws and other internal rules suggest that other safeguards may evolve within the legislative arena in addition to the constitutional procedures Clark relies on to protect federalism.[3]. Finally, even if Clark's conclusion that courts should vigorously enforce constitutional procedures is correct, similarly aggressive

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[1] 79 Tex. L. Rev. 1321 (2001).

[2] INS v. Chadha, 462 U.S. 919, 951 (1983).

[3] The constitutional procedures relating to separation of powers that Clark relies on to protect federalism actually work to entrench the status quo, rather than to target principles of federalism. If the status quo already includes laws that are detrimental to strong state governments, then the "finely wrought and exhaustively considered" procedures will make it more difficult to repeal those statutes and reach a more balanced arrangement. To put it another way, the status quo that the constitutional procedures protected 200 years ago is a very different one in terms of federalism than the status quo protected in the 21st century.

judicial enforcement of framework laws is not necessarily justified and might be counterproductive.

Congress can add to constitutionally-mandated procedures with respect to all laws (e.g., the filibuster rules in the Senate, the Rules Committee in the House, the committee structure in both houses), and it can enact more targeted rules that apply only to a subset of legislative proposals. With respect to the latter, Congress sometimes adopts such targeted rules as part of statutes, or framework laws, which establish internal procedures that will shape legislative deliberation and voting with respect to certain decisions in the future.[4] In one area that affects the relationship between the federal government and the states – the enactment of unfunded mandates that burden states and localities – Congress has adopted a framework law: the Unfunded Mandates Reform Act of 1995 (UMRA).[5] UMRA has been in effect for over a decade and is an integral part of the procedural environment shaping congressional consideration of certain proposals implicating federalism. In general, UMRA increases the hurdles, in both the House and Senate, to enactment of new unfunded mandates. Although its provisions are not constitutionally required, in contrast to bicameralism and presentment, they are part of the "finely wrought" process through which proposals imposing certain intergovernmental mandated become laws.

In this article, I will use the theoretical work on framework laws I have developed elsewhere[6] to assess UMRA. In Part I, I will briefly describe UMRA and relate it to the larger congressional budget process framework, of which UMRA is part. In Part II, I will determine which of the purposes of framework laws UMRA serves, concluding that it serves, to greater or lesser extent, four purposes. It provides a symbolic response to an issue made salient in the early 1990s; it provides a solution to collective action problems often encountered by multimember legislatures, particularly as it provides information to lawmakers about the scope of proposed unfunded mandates; it is a precommitment and entrenchment device to make it harder for Congress to pass unfunded mandates imposing

[4] Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Leg. Iss. 717, 718 (2005) [hereinafter *Purposes*].
[5] Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).
[6] See, e.g., Garrett, *Purposes*, *supra* note 4; Elizabeth Garrett, *Conditions for Framework Legislation*, in The Least Examined Branch: The Role of Legislatures in the Constitutional State 294 (R.W. Bauman & T. Kahana eds., 2006) [hereinafter Garrett, *Conditions*].

costs above a certain threshold; and it shifts power away from committees to individual members and to congressional party leaders. In Part III, I will discuss why UMRA was passed as a statute, rather than as simple resolutions changing the internal rules of each house.

Finally, in Part IV, I will identify and discuss two of the challenges facing framework laws designed to further the values of federalism. First, any framework law, including those dealing with federalism, must define ex ante the universe of future proposals to which it will apply. That is part of the explanation for UMRA's narrow targeting of unfunded intergovernmental mandates. Other federalism frameworks could aim at different, relatively concrete problems, such as preemption or conditions of assistance. This ability to target a particular set of laws differentiates framework law protection from the constitutional protection Clark describes; constitutional separation of powers principles apply to any laws adopted by Congress, those that further federalism principles as well as those that undermine them. Second, the role that a framework law like UMRA should play in judicial review is unsettled. Potentially, just as Professor Clark would advocate for aggressive judicial review to ensure that the constitutional requirements of lawmaking are followed, courts could police Congress' adherence to its own internal rules, especially those passed in statutized form.[7] I conclude, however, with skepticism about judicial review of compliance with framework laws. Not only would it likely lead to a congressional response to avoid judicial review in many cases – perhaps reducing the use of framework laws generally – but courts would also find it challenging to discern whether lawmakers had complied with internal rules in any particular decision.

I. The Unfunded Mandates Reform Act of 1995

In the 1990s, the intergovernmental lobby placed the issue of unfunded federal mandates on the national agenda. In March 1995 Congress passed, and President Clinton signed, the Unfunded Mandates Reform Act which established a procedural framework to shape congressional deliberations concerning certain unfunded mandates (Title I) and required administrative agencies to assess the effects of any major regulation that imposes an intergovernmental mandate (Title II). Throughout this article, I will focus

[7] See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & Pol. 345, 346 (2003) (referring to framework laws as "statutized rules") [hereinafter Bruhl, *Using Statutes*].

primarily on Title I, "Legislative Accountability and Reform," but in Part III, I will discuss the significance of Title II, "Regulatory Accountability and Reform," in the congressional decision to use a statute to adopt these internal rules. UMRA has been effective since 1996, providing over a decade of experience with its requirements. Each year the Congressional Budget Office (CBO) provides an annual report on Title I's provisions, and it has produced five- and ten-year assessments[8]; the Government Accountability Office (GAO) has published several assessments of the entire Act and of Title II in particular.[9]

UMRA does not prohibit Congress from enacting unfunded mandates; instead, it results in the generation of more information about intergovernmental mandates (funded and unfunded) pending in the legislature. It also allows members to raise points of order against bills with unfunded mandates that exceed certain thresholds, requiring a separate majority vote to impose the mandate; in the 109th Congress, the point of order temporarily provided additional teeth in the Senate because 60 votes were required to waive it.[10] UMRA defines an intergovernmental mandate as any provision in law that would "impose an enforceable duty" on a state or local government; that would reduce or eliminate funding for previously enacted mandates; or that would increase the stringency of conditions for certain federal entitlement programs or cut funding for such programs.[11]

The Act's coverage is relatively narrow; for example, it does not apply in most cases to duties that are imposed by the federal government as a condition of receiving federal assistance or as part of participating in a voluntary federal program.[12] This gap in

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[8] See, e.g., Congressional Budget Office, A Review of CBO's Activities Under the Unfunded Mandates Reform Act, 1996 to 2005 (Mar. 2006) [hereinafter CBO Ten-Year Review]; Congressional Budget Office, A Review of CBO's Activities in 2006 Under the Unfunded Mandates Reform Act (Apr. 2007) [hereinafter CBO 2006 Review].

[9] See, e.g., General Accounting Office, Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (Feb. 1998) [hereinafter GAO, Little Effect]; General Accounting Office, Unfunded Mandates: Analysis of Reform Act Coverage (May 2004) [hereinafter GAO, Coverage].

[10] See H. Con. Res. 95, 109th Cong., § 403(b). In the fiscal year 2008 concurrent budget resolution, the Senate, now controlled by Democrats, decided to eliminate the supermajority voting requirement, which was originally to remain in effect through fiscal year 2010. See S. Con. Res. 21, 100th Cong., § 205. This change should not have been a surprise: Senate Democrats had vehemently and successfully resisted a supermajority voting requirement when UMRA was originally enacted. See Timothy J. Conlan, James D. Riggle & Donna E. Schwartz, *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, 25 Publius 23, 32 (1995).

[11] Unfunded Mandate Reform Act of 1995 § 421, 2 U.S.C. § 658 (1995). UMRA also applies to mandates affecting tribal governments, but that aspect of the Act is not relevant to this analysis.

[12] Id.

coverage is significant and allows bills with substantial implications to escape UMRA review.[13] For example, the No Child Left Behind Act[14] imposes significant burdens on states and school districts, but it is not within the scope of URMA because all the costs incurred by subnational governments result from complying with conditions of federal aid.[15] UMRA also has a list of specific exclusions, including proposals enforcing constitutional rights or anti-discrimination laws; legislation relating to accounting and auditing procedures for grants; proposals to provide emergency assistance to states and localities, including those determined to be emergencies by the President and Congress; national security laws and treaty ratifications; and proposals relating to Social Security.[16] CBO has estimated that only about 2% of the bills it has analyzed contained mandates that fell within these enumerated exceptions.[17] Finally, the Act does not apply to appropriations bills (except it does apply to legislative provisions in such bills); this exclusion is more significant than the listed exceptions. However, CBO informally reviews all appropriations bills as they are considered and alerts staff if it identifies any mandates.[18]

One of the major goals of UMRA, discussed in more detail in Part II, is to produce more information about intergovernmental mandates for members of Congress and to ensure that the information plays a role in congressional decision making. When an authorizing committee reports a bill or joint resolution containing any federal mandate, it must provide the bill to the Director of the CBO and identify the mandates. CBO then analyzes the proposed legislation and prepares an UMRA statement that must be included in the committee's report on the bill. If the total direct costs of an intergovernmental mandate exceed $50 million, a figure adjusted for inflation since 1996,[19] in any of the first five fiscal years after the mandate would become effective, CBO must provide an estimate of the direct costs. UMRA defines "direct costs" as "the aggregate estimated amounts that all State, local and tribal governments would be

[13] See text accompanying notes *infra* at 123 through 126.
[14] Pub. L. No. 107-56.
[15] See GAO, Coverage, *supra* note 9, at 23-24.
[16] Unfunded Mandate Reform Act of 1995 § 422, 2 U.S.C. § 658a.
[17] Government Accountability Office, Unfunded Mandates: Views Vary about Reform Act's Strengths, Weaknesses, and Options for Improvement 10 (Mar. 2005) [hereinafter GAO, Views Vary].
[18] CBO Ten-Year Review, *supra* note 8, at 59 n.2.
[19] The threshold in 2006 was $64 million.

required to spend or would be prohibited from raising in revenues in order to comply with the Federal intergovernmental mandate."[20] Furthermore, CBO must identify any increase in federal appropriations or other spending that has been provided to fund the mandate. CBO also provides mandate statements, if requested and "to the greatest extent practicable," for floor amendments, conference reports, and legislative proposals, including updating its original estimate if necessary. From 1996 to 2005, CBO formally reviewed approximately 5,800 bills and other legislative proposals.[21]

Title I of UMRA is enforced through internal parliamentary devices called "points of order." A point of order can be raised on the floor of the House or Senate to object to proceeding to a vote on a bill because a procedural requirement has been violated. In the case of UMRA, a point of order lies against any legislative proposal reported out of an authorizing committee that is not accompanied by a mandate report and cost statement.[22] In addition, any bill, joint resolution, amendment, motion or conference report that includes an unfunded intergovernmental mandate exceeding the threshold is subject to a point of order.[23] Congress can provide funding for a mandate in several ways. First, it can be funded through new direct spending authority, which provides money without further congressional action.[24] Second, if the bill merely authorizes the spending, then it can identify an appropriations bill that would provide the actual funding and establish provisions to make the effectiveness of the mandate conditional on Congress' appropriating the required amounts.[25] This latter provision is called the Byrd amendment, named for the Senator from West Virginia who added it during floor deliberations of UMRA. Under this "lookback" provision, UMRA requires congressional reconsideration if insufficient appropriations are provided in the ten years after the mandate becomes effective, either because the appropriations were never enacted or were scaled back, or because CBO's estimates of direct costs turned out to be lower than the actual costs. In that event, the agency notifies Congress of the shortfall, and if Congress

[20] Unfunded Mandate Reform Act of 1995 § 421, 2 U.S.C. § 658.
[21] CBO Ten-Year Review, *supra* note 8, at 2.
[22] Unfunded Mandate Reform Act of 1995 § 425, 2 U.S.C. § 658d.
[23] Id.
[24] Id.
[25] Id.

does not provide funding or scale back the mandate within thirty days, the mandate ceases to be effective.

Until fiscal year 2006, UMRA required only a majority vote in either house to waive a point of order raised there. This meant that the enforcement procedure really only mattered in the House of Representatives, because the Senate's less restrictive floor procedures had essentially always allowed a senator to force a majority vote on a mandate by moving to strike it from the bill. An objecting representative is further strengthened in the House, because the Act provides that a special rule promulgated by the Rules Committee attempting to waive an UMRA point of order without a separate vote is itself out of order.[26] This restriction on the Rules Committee is important because most points of order that could be raised in the House, for example, against budget-related proposals, are waived as part of the special rules regulating most debate. The point of order process in the Senate became important in the 109th Congress when the Senate increased to 60 the votes needed to waive an UMRA point of order. Before that, only about a dozen points of order had been raised, and all of those in the House. After the change in the voting requirement in the Senate, more have been raised in the House, and two in the Senate, both of which were sustained, thereby killing two amendments to an appropriations bill that would have raised the minimum wage.[27] The Senate's voting requirement reverted back to a simple majority voting requirement in the 110th Congress, perhaps as a result of the change in partisan control of that body.[28]

Although UMRA can be seen as a stand-alone framework law, triggered by a certain group of intergovernmental mandates, it is formally an amendment to one of the most important modern framework laws, the congressional budget process.[29] Because of

[26] Id. at § 426, 2 U.S.C. § 658e.
[27] CBO Ten-Year Review, *supra* note 8, at 5.
[28] See S. Con. Res. 21, § 205. The version that passed the Senate initially extended the 60 vote supermajority requirement until 2017, but the conference report changed the treatment of UMRA points of order to return to the simple majority requirement. See H.R. Rep. 110-157, Concurrent Resolution on the Budget for Fiscal Year 2008, 110th Cong., 1st Sess., at 61, 67-68.
[29] For descriptions of the modern congressional budget process, see Allen Schick, The Federal Budget: Politics, Policy, Process (rev. ed. 2000); William Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy Chapter 4 (4th ed. 2007 forthcoming). The federal budget framework is governed primarily by several laws passed in the last three decades, including the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 601-688 (2007), the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, 2

its relationship to the budget framework and because the budget framework's ubiquitous role throughout congressional deliberations, UMRA shares many of the features of the larger framework law. Both respond to collective action problems, which I will discuss in more detail in Part II, that are faced by multi-member institutions such as Congress and are particularly acute in the budget context; both emphasize the importance of better information to improve congressional deliberations; and both use point of order techniques to enforce their provisions. At various times during the last three decades of the modern congressional budget process, some of the Budget Act's provisions have also been subject to enforcement through sequesters, or cuts in funding for certain programs triggered when Congress does not keep federal spending within established budget caps. A sequester is overseen by the Office of Management and Budget (OMB) pursuant to statutory instructions that limit OMB's discretion in implementation. There is no comparable enforcement for UMRA, other than the Byrd lookback provision which has never been used.[30] Even when sequesters have appeared to be in the offing, however, Congress and the President usually find a way to avoid such cuts. Thus, the primary enforcement mechanism for the congressional budget framework has been points of order (often requiring 60 votes in the Senate to waive, but amenable to mass waiver in the House through a special rule), coupled with the occasional threat of sequester.

UMRA differs from some salient features of the congressional budget process in a way relevant to my analysis. One engine of the modern congressional budget process, budget reconciliation, eliminates some of the major hurdles to enacting legislation, particularly in the Senate.[31] An omnibus budget reconciliation act, which typically includes changes to revenue laws and entitlement programs, cannot be filibustered in the Senate; instead, a reconciliation bill is considered under rules that limit debate significantly and allow passage by a simple majority.[32] Other provisions make it harder

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U.S.C. § 900 (2007), and the Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified in scattered sections of 2 U.S.C.).

[30] GAO, Coverage, *supra* note 9, at 17.

[31] See William Dauster, *The Congressional Budget Process*, in Fiscal Challenges: An Interdisciplinary Approach to Budget Policy __ (E. Garrett, E. Graddy & H. Jackson eds. 2007 forthcoming) (discussing reconciliation and other procedures affecting budget legislation).

[32] See, e.g., Gregory J. Wawro & Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* 27 (2006) (of 90 major laws enacted between 1975 and 1994, only ten passed with fewer than 60 senators voting in favor and half of those were budget bills).

for members to amend budget-related legislation on the floor, which might unravel deals struck in committee, because the amendments would have prohibited revenue effects. Certainly, reconciliation laws still have to meet the constitutional requirements for enactment emphasized by Professor Clark, but passage is more likely for these bills than other major legislation because internal impediments are eliminated or lessened. UMRA, on the other hand, is designed to add *more* obstacles to the enactment of unfunded mandates than usually face legislative proposals; it provides points of order with teeth (immunity from special rule waivers in the House and, at least for a brief period of time, supermajority voting requirements in the Senate) so it can disaggregate deals involving unfunded mandates and force targeted votes on mandates of a certain size.

II. The Purposes Served by UMRA

In other work, I have identified five reasons that Congress may decide to address a problem with a procedural tool like a framework law, rather than just directly adopting responsive substantive legislation or changing the type of substantive legislation it enacts.[33] In other words, Congress must have a reason to adopt UMRA as a way to structure future decisions about unfunded mandates rather than altering each unfunded mandate when it comes before the legislature to better comport with the values of federalism. Framework laws serve at least five purposes that could not be achieved as easily or in the same way without them: providing a symbolic response on a salient issue; articulating neutral rules for a set of future decisions; serving as a coordination device to solve collective action problems; entrenching certain objectives so that future decisions are more likely to meet them; and changing the internal balance of power in Congress. UMRA is motivated by all but the second purpose of framework laws; indeed, it was consciously designed not to be neutral among outcomes but to stack the deck against unfunded mandates. I will discuss each of the other four purposes as they relate to UMRA.

A. A Symbolic Response

Laws often serve expressive or symbolic purposes along with other objectives. This is not necessarily an indictment of the law; indeed, in some cases, the success of a law as a symbol can also facilitate its success along other dimensions. However, in some

[33] Garrett, *Purposes*, *supra* note 4, at 733.

cases, legislation is designed cynically as empty symbolism to allow lawmakers to appear to respond to constituent demands while allowing politics as usual to continue. There is some reason to believe that UMRA was empty symbolism for at least some supporters; for example, the Byrd lookback provision that requires a reassessment of mandates if the promised funding is never enacted or falls short has never been implemented. The nature of federalism itself may lead to largely symbolic responses by Congress because federalism is a relatively abstract concept that voters find attractive but hard to understand concretely.[34] We will return to the challenges of abstraction in designing an appropriate framework law in Part IV; here, it is sufficient to note that symbolic responses are more likely in such a context – and they are more likely to quiet the public advocating for reform.

However, if supporters hoped to enact an empty symbol, they did not succeed. UMRA has affected the dynamics of congressional deliberation and the substance of legislation enacted by Congress in the more than ten years it has been effective. CBO reports that its analysts meet frequently with congressional aides so that legislation is drafted to avoid running afoul of UMRA.[35] Observers generally believe that UMRA has the most influence before a bill reaches the floor as drafters work to avoid its provisions. Former Rules Committee Chairman Solomon (R–N.Y.) observed: "It has changed the way that prospective legislation is drafted. Anytime there is a markup, this always comes up."[36] For example, the Internet Tax Freedom Act (IFTA),[37] considered in 1997, would have prohibited states and localities from collecting some taxes for a period of time.[38] This falls under UMRA's scope because direct costs include amounts that states and localities "would be prohibited from raising in revenues" as a consequence of a mandate. CBO originally estimated that the Act's direct costs would exceed the UMRA threshold. The cost statement was a significant factor in Congress' decision to amend IFTA so that

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[34] Cf. Rodney E. Hero, *The U.S. Congress and American Federalism: Are "Subnational" Governments Protected?*, W. Pol. Q. 93, 95 (1988) (noting "it is not clear that citizens understand, much less attach particularly high value to" various principles of government including federalism).
[35] See Theresa A. Gullo & Janet M. Kelly, *Federal Unfunded Mandate Reform: A First-Year Retrospective*, 58 Public Admin. Rev. 379, 384-85 (1998).
[36] Allan Freedman, *Unfunded Mandates Reform Act: A Partial "Contract" Success,* Cong. Q. Weekly, Sept. 5, 1998, at 2318 (providing other examples).
[37] Pub. L. No. 105–277, 112 Stat. 2681–719,
[38] Theresa Gullo, *History and Evaluation of the Unfunded Mandates Reform Act*, 57 Nat'l Tax J. 559, 567 (2004).

it was "narrower in scope and specifically allowed states that were currently collecting a sales tax on Internet access to continue to do so."[39] The amended proposal's direct costs fell below the threshold; thus, the bill was not subject to a point of order when it was considered on the floor.

The 60-vote point of order in the Senate also had real consequences when it was in effect. In 2005, the enforcement mechanism was used to defeat two amendments to raise the minimum wage that were offered to an appropriations bill.[40] Minimum wage bills, which apply to states and localities, are unfunded mandates that typically trigger UMRA's protections because the burden they impose far exceeds the threshold and, of course, are not funded by the federal government.[41] Here, dueling amendments were offered, one by Senator Edward Kennedy (D–Mass.) to raise the minimum wage substantially, and the other offered by Senator Michael Enzi (R–Wyo.) to raise the minimum wage and also to exempt many small businesses from many federal labor practices.[42] One watchdog group, OMB Watch, claimed that the supermajority requirement in the Senate "transformed a relatively harmless procedural mechanism into an insurmountable roadblock to important protections for the public interest."[43] With the reversion to a simple majority voting requirement in fiscal year 2008, the Senate point of order process will be much less significant.

For those supporters who had hoped that UMRA would usher in real changes in the deliberative process and serve goals in addition to symbolic purposes, it is still quite likely that the symbolism of a framework law was important to them. The issue of unfunded mandates had been placed on the national agenda through a series of symbolic events. The campaign to eliminate or reduce unfunded mandates was led by the intergovernmental lobby. This group is a loosely-coordinated coalition of more than

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[39] Id. at 568.
[40] S. Amdt. 2063, 109th Cong. (2005), 151 Cong Rec. S 11512; S. Amdt. 2115, 109th Cong. (2005), 151 Cong Rec. S 11547.
[41] Perhaps not surprisingly, both *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) deal with federal minimum wage statutes.
[42] See Cong. Rec., Oct. 19, 2005, at S11547-48.
[43] OMB Watch, *Senate Uses Minimum Wage Increase to Push Anti-Regulatory Agenda* (Nov. 1, 2005), http://www.ombwatch.org/article/articleview/3151/1/{category_id}.

sixty organizations representing state and local public officials.[44] The most influential are "The Big Seven," comprising the Council of State Governments, International City Management Association, Nation's Association of Counties, National Conference of State Legislatures, National Governors' Association, National League of Cities, and the U.S. Conference of Mayors. These groups funded several studies about the impact of unfunded mandates on states and localities, and they organized high-profile protests to move the issue to the forefront of the national agenda. Perhaps the best known study estimated the costs of unfunded mandates on 314 cities surveyed to be $6.5 billion in 1993 and $54 billion in the following five years.[45] Although the methodology of the study was attacked, it was influential in shaping the policy debate. The report was released during a rally on the Capitol steps on "National Unfunded Mandates (NUM) Day" held on October 27, 1993.[46] The publicity did result in heightened attention to the extent and effect of unfunded mandates; the number of newspaper articles mentioning "unfunded federal mandates" rose from 22 in 1992 to 836 in 1994, right before the debate began in Congress.[47]

Efforts to pass UMRA fell short, however, despite the lobbying, until the Republican takeover of the House, facilitated in part by the potent symbolism of the "Contract with America." The Contract was the national platform developed by House Republicans in their successful bid to achieve majority status in the 1994 mid-term elections. In its opening passages, the Contract declared, "[I]n this era of official evasion and posturing, we offer instead a detailed agenda for national renewal, a written commitment with no fine print."[48] Republicans promised to bring to the floor of the House, within the first 100 days of the 104th Congress, ten bills, one of which included unfunded mandates reform.[49] UMRA was indeed one of the first promises in the Contract to be considered in both houses – Majority Leader Dole designated it as S. 1 to

[44] See David Arnold & Jeremy Plant, Public Official Associations and State and Local Government: A Bridge Across One Hundred Years (1994).
[45] Price Waterhouse, Impact of Unfunded Federal Mandates on U.S. Cities: A 314–City Survey (1993) (funded by the U.S. Conference of Mayors).
[46] See Conlan, et al., *supra* note 10, at 24.
[47] Id. at 27.
[48] Republican Contract with America, http://www.house.gov/house/Contract/CONTRACT.html.
[49] Job Creation and Wage Enhancement Act, contained in Republican Contract with America, http://www.house.gov/house/Contract/cre8jobsd.txt.

signal UMRA's importance to his agenda,[50] and it was H.R. 5 in the House. It was the first promise fulfilled, and one of the few promises in the Contract to be enacted.[51] In short, UMRA is a part of a larger symbol, the Contract with America, that continues to represent to Republicans the way they achieved control of the House after decades of being in the minority.

A framework law was the best way to respond to the cries for a reduction in the number and scope of unfunded mandates, even if one assumes that a Republican Congress was likely to pass fewer unfunded mandates without a framework.[52] The demand by those seeking reform was to change the way Congress makes decisions in this arena. Although lawmakers could promise to behave differently in the future, a framework law is a way for Congress as an institution to credibly commit to a long-lasting change in behavior – at least, the law is a credible as the enforcement mechanisms it contains. Moreover, a framework law which applies indefinitely (until discarded or changed) is a suitable answer to a concern that the problem is a long-term one that demands a comprehensive response, one that will apply to laws in the future, not just the immediate decision.

In other words, one aspect of the symbolic value of passing a framework law is that it saliently demonstrates Congress' commitment to meet other objectives that a framework is peculiarly suited to – in this case, entrenching the view that unfunded mandates should be harder to pass than other legislation. It may also, by virtue of its enactment, its requirements for frequent cost statements, and lurking threat of points of order that cannot be waived under the radar screen by special rules, more prominently place the issue of unfunded mandates on the congressional agenda in the future.[53]

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[50] 141 Cong. Rec. S828-894 (daily ed. Jan. 112, 1995) (statement of Sen. Dole).
[51] Gullo & Kelly, *supra* note 35, at 380.
[52] This assumption is doubtful. As I will discuss in Part II.C., collective action problems beset Congress in this arena so even lawmakers committed to a view of federalism which is hostile to unfunded intergovernmental mandates might enact more than they would prefer. Recent experience also suggests that Republican national legislators are just as willing to preempt state and local government action and impose directives on the states as Democrats, albeit on different topics. National laws concerning education, marriage policy, reproductive decisions, and tax decisions have been warmly received by Republicans in the same way that environmental regulations, minimum wage laws, and safety rules are by Democrats.
[53] See GAO, Views Vary, *supra* note 17, at 22. See also, House Committee on Rules, *The Unfunded Mandates Point of Order*, Parliamentary Outreach Program Newsletter, vol. 105, no. 11 (June 18, 1999), available at http://www.rules.house.gov/POP/pop106_11.htm (quoting Rep. Condit (R–Calif.) that an

Certainly, the even more influential congressional budget process has led to a greater consciousness about budget consequences when Congress is legislating in any realm. Ferejohn explains that lawmakers will sometimes adopt mechanisms to better assure accountability by facilitating monitoring by constituents because these arrangements increase the trust that the principals are willing to accord their agents.[54] Although he makes this point with respect to rule changes increasing transparency in government, a similar dynamic may have led to the promised in the Contract with America and the subsequent adoption of UMRA.

B. Solving a Collective Action Problem to Produce Information

Like many other procedures in legislatures, framework laws operate to help multi-member bodies solve collective action problems. In particular, frameworks like UMRA and the congressional budget process are designed to produce more optimal amounts of information. Without a centralized entity providing information and a way to ensure it is made available broadly and in a timely manner, valuable information is apt to be under-produced by a legislature. All legislators benefit when a particular legislator or her staff spends time developing data, but the legislator who produces the information uses time that she could have spent on tasks contributing more directly to her reelection. Thus, an individual lawmaker will not internalize all the benefits of information production if she wishes to use it in public debate, but she will shoulder all the costs. In the end, information will be under-produced without intervention. UMRA solves this problem, at least partially, because the State and Local Government Cost Estimates Unit in CBO prepares mandate cost statements that are available to committees during their consideration of bills and to all members of Congress during floor deliberations. CBO itself was created by the 1974 Budget Act to solve a similar collective action problem in producing budget information, a problem that had disadvantaged the legislative branch relative to the President with his specialized OMB staff.

Intergovernmental mandates present particularly acute problems relating to information that a framework law can mitigate. First, determining the magnitude of costs

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"atmosphere of awareness" about intergovernmental mandates "has been fostered by the point of order procedure established under the Unfunded Mandates Reform Act").

[54] John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in Democracy, Accountability, and Representation 131, 148-49 (A. Prezeworski, S.C. Stokes & B Manin eds., 1999).

associated with a particular intergovernmental mandate can be difficult, particularly for a lone member of Congress without a large or sophisticated staff. For example, the estimate of costs to comply with the Fair Labor Standard act's overtime provisions required studying the effects on 3,000 counties, 19,000 municipalities, 17,000 townships, 15,000 school districts, and 29,000 local special districts.[55] An estimate of the direct costs of intergovernmental mandates contained in the Personal Data Privacy and Security Act of 2005 noted that the requirements would affect more than 19,000 entities, including "75,000 municipal governments, about 3,600 counties, more than 100 public hospitals, about 100,000 schools, 14,000 school districts, and more than 1,500 public post-secondary institutions."[56] It would be difficult for a member of Congress with his personal staff, or even a committee chair with her staff, to gather and analyze this amount of data. Lobbyists may in some cases provide information about the burden of intergovernmental mandates, although lawmakers and their aides must discount this information somewhat because it is provided by interested parties. Although lobbyists are repeat players who need to establish some reputation for truthfulness, they will also work to present information in a way that will buttress their arguments and favor the outcome they prefer. Under the UMRA framework, interested groups still interact with CBO as it produces mandate cost statements and provide necessary data, but that information is weighed and analyzed by CBO's professional, nonpartisan staff before it is disseminated to Congress and used in deliberation and debate.[57]

Second, information must be provided at a time it is useful – that is, when it can change the outcome of decisions. A member who does not sit on a particular committee

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[55] Theresa A. Gullo, *Estimating the Impact of Federal Legislation on State and Local Governments, in* Coping with Mandates 41, 46-47 (Michael Fix & Daphne A. Kenyon eds., 1990).

[56] Congressional Budget Office Cost Estimate, S. 1789, Personal Data Privacy and Security Act of 2005, as reported by the Senate Committee on the Judiciary on November 17, 2005 (Apr. 19, 2006). See also S. Rep. 104-308, at 43-44 (1996) (concerning the direct costs of an act applying federal workplace health and safety laws to all public workplaces and indicating that the mandate would affect 31 states or territories, 54,500 governmental units, and 29,000 local special districts).

[57] Interestingly, UMRA may solve a problem facing interest groups that arises from the collective nature of Congress. Before UMRA, interest groups had to interact with a variety of substantive and appropriations committees, any of which could consider and recommend unfunded mandates. Now, groups can rely on the CBO mandate cost statement process to identify mandates and help them target their efforts, and they have one centralized entity with the responsibility for analyzing such mandates. Thus, lobbyists can use their time more efficiently, providing information to CBO as it develops estimates and using the information CBO produces to target particular committees considering substantial intergovernmental mandates.

may not be aware of an intergovernmental mandate until the bill comes to the floor, and there may be little time for her to generate information, analyze the data, and disseminate it. Even if she can, it is difficult in the House to amend major laws once they reach the floor because they are usually considered under restrictive special rules. Even in the more free-wheeling Senate, most of the changes in legislation occur at the committee stage or before the bill arrives for consideration by the full body. UMRA solves this problem by providing information during the committee deliberations and often during the initial drafting stages. If a mandate cost statement does not accompany a bill to the floor, then a point of order can halt its consideration until the information is provided.

Third, a framework can require information be provided in a way that illuminates the cumulative effect of many decisions made over time. The UMRA framework does not address this informational problem as directly as it does the other two challenges.[58] UMRA's disclosure provisions apply bill-by-bill or for individual amendments and do not provide a running tally or larger perspective except in the annual reports. CBO has published five- and ten-year assessments of its work under UMRA, in addition to the annual assessments. These retrospective documents give a fuller sense of all the intergovernmental mandates of significance considered by Congress over several years. However, their focus is on mandates that exceed the statutory threshold, so there is no assessment of the cumulative financial effect of mandates with direct costs below $50-64 million annually.[59] Presumably, this total figure could be quite substantial; in the first ten years UMRA has been in effect, 700 bills contained intergovernmental mandates, but only 64 of those included mandates that exceeded the threshold.[60] Congress could require more extensive review of the total direct costs of all mandates and an identification of how many of these mandates were ultimately unfunded. However, this would require a substantial commitment of time and energy by CBO. Unless there was

[58] See GAO, Views Vary, *supra* note 17, at 23.
[59] Although the Advisory Commission on Intergovernmental Mandates was charged by UMRA to prepare a series of reports providing a broader vision of federal mandates, setting out their costs and benefits, and providing recommendations for change, the Commission was disbanded before it could fulfill all these objectives. See Gullo & Kelly, *supra* note 35, at 386.
[60] CBO Ten-Year Review, *supra* note 8, at 2-3.

some way to enforce this informational requirement, it is likely that it would not be a top priority for CBO as it deploys its limited staff and resources.[61]

One can imagine different designs for frameworks aimed at the production of information about aggregate costs of mandates and designed to increase the likelihood that the information would play a larger role in deliberation, although such frameworks are likely to be unworkable in practice. For example, just as the budget process has applied caps on spending to constrain the overall effect of the many decisions made in the twelve appropriations bills, Congress could set annual or multi-year limits on the total costs of unfunded mandates – a sort of "unfunded mandates budget" that would constrain decisions made in dozens of bills passed during the session. The challenge with such a framework would be its enforcement. Statutory budget caps were enforced until fiscal year 2002 through the sequestration process requiring OMB to uniformly reduce federal spending if the total exceeded the limit. It is not clear how Congress could effectively apply such a process to unfunded mandates. Perhaps a point of order process could make it more difficult to enact additional mandates once the limitation had been reached in a particular year. Such an enforcement mechanism would result in a rush to legislate before the cap is reached, and it would also encourage drafters of mandates late in the session to delay the effective dates so that the costs would fall in years with room under the cap. That, in turn, would just exacerbate the problem in the later year – or put pressure on Congress to lift that year's cap.[62] Perhaps the Byrd lookback provision could provide a model to enforce a comprehensive mandates budget, but it is difficult to imagine how a set of mandates could be sensibly cut back. One can reduce funding in all federal programs by 10% to meet a spending cap, although not without sometimes severe fiscal pain, but how does one cut back a requirement to upgrade government workplaces to meet safety requirements by 10%? How does one shave 10% off an intergovernmental mandate that preempted the states' taxing authority in an area? In some cases, the federal government might be able to instruct states to pare the mandate back by a certain amount

[61] See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1153-54 (1997) (describing ineffectiveness of the State and Local Cost Estimate Act of 1981, the precursor to UMRA, because of absence of enforcement) [hereinafter Garrett, *Enhancing Safeguards*].

[62] This is a problem similar to that raised by advance appropriations, where Congress makes an appropriation in one fiscal year but scores the money against a cap in a future fiscal year. See Schick, *supra* note 29, at 63-64.

and provide them the flexibility to determine how to reduce the burden, but many intergovernmental mandates do not operate in ways to make a pro-rata reduction in their scope feasible.

Framework laws, like UMRA, can solve the relatively benign, but potentially serious problem of producing sufficient relevant information for a collective body that suffers from free-rider problems. The hope is that better-informed lawmakers will not pass as many laws that burden states and localities with unfunded mandates; the argument is that legislators are well-intentioned but through ignorance pass laws that they would prefer not to. However, it may be that a more troubling phenomenon explains why federal lawmakers successfully and frequently negotiate through the "finely-wrought" constitutional requirements of lawmaking to pass legislation that undermines the values of federalism. Framework laws can also help in this context by erecting more hurdles than the few in Article I and targeting the more rigorous procedures as much as possible to the set of legislative proposals that are especially problematic.

C. Entrenching a Bias in Favor of Federalism

Members of Congress are likely to pass more laws burdening state and local governments and preempting state policies than would be optimal for several reasons. First, all national lawmakers wish to effect change in various policies, both because they believe change serves what they view as the best interest of the country and because their reelection is helped when they can tell voters they passed laws that voters favor. Thus, even if some lawmakers believe that certain policies are better adopted and implemented on the state level, they may nonetheless resort to federal lawmaking as a second-best alternative over which they have more influence. In that way, they ensure the reform happens – and they claim credit for it. To put it another way, people seldom seek national office, enduring the difficulties of the modern campaign, only to argue that other political actors ought to be making key decisions while they sit back and watch.[63]

Second, the context of allocation of resources in a federal system gives rise to particular pathologies that are likely to lead to congressional enactment of a greater level of unfunded intergovernmental mandates than is optimal. These pathologies are so strong that the constitutional lawmaking requirements will not stand in the way of many

[63] See Zoe Baird, *State Empowerment after* Garcia, 18 Urban Lawyer 491, 504 (1986).

of these laws, and thus stringently enforcing the constitutional procedures, as Professor Clark urges, will not necessarily provide much protection for the values of federalism. Lawmakers who hope to be reelected will rationally prefer to separate the act of establishing popular federal programs from the act of raising funds to pay for them if by doing so they can avoid responsibility for the latter act. In particular, politicians desperately wish to avoid raising taxes, a salient issue for most voters during an election. There are several ways that Congress can try to distance itself from raising taxes. Lawmakers can fund programs through deficit spending, which shifts the burden of financing to people who are not yet voting, and indeed who may not yet be born.[64] Another attractive funding option for a federal lawmaker is to force state and local governments to shoulder the bill – a practice called "liability-shifting"[65] – as long as the federal legislators can still claim credit for the popular programs that are receiving the funds. The ability to engage in liability-shifting may lead members of Congress to impose more unfunded mandates on states and localities than they think is consistent with a robust federal system.[66] In the end, their preference to claim credit for new programs without taking the blame for decisions made to provide funding overcomes any preference they have about the appropriate balance of power between federal and subnational governments. Many simply cannot withstand the temptation, no matter what their other values and no matter what their partisan affiliation.

Federal lawmakers can engage in liability-shifting because it is difficult for state and local officials to argue persuasively to voters that higher state or local taxes or reduced services are the result of decisions made in Washington, D.C.[67] Tracing such an action back to the cost of several unfunded mandates is difficult and time-consuming, and voters are apt to be cynical when they hear subnational officials make these arguments,

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[64] The congressional budget framework, particularly after adoption of Gramm-Rudman-Hollings in the mid-1980s and the Budget Enforcement Act of 1990, has made it more difficult, but certainly not impossible, for Congress to use deficit financing.

[65] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1065 (1995).

[66] See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1472-73 (1995) (explaining prisoner's dilemma problem in context of federalism generally).

[67] But see David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. Cal. L. Rev. 1, 18-21 (1995) (arguing that voters should be able to get information about liability-shifting if the problem of unfunded mandates is serious enough).

assuming instead that the lower level officials are the ones shirking responsibility. The possibility of taking advantage of this fiscal illusion may cause federal legislators to ignore principles of federalism when constructing national policies, even if their past experience predisposes them to be sympathetic to such values. Moreover, if federal lawmakers avoid all or most of the responsibility for funding national priorities, they may never develop a full sense of the costs of those programs and thus pass more costly programs than would be desirable. It is not only voters who may suffer from a fiscal illusion; lawmakers who are not held accountable for the costs of programs may not appropriately consider them in determining which policies have benefits that exceed their costs.

A framework law can help correct this bias by erecting more hurdles in the path of legislation that is susceptible to the pathologies. Supermajority voting requirements are a straightforward way to make legislating in an area more difficult. Although the cloture rules, which require 60 votes to cut off debate in the Senate and bring a bill to a vote, provide supermajority vote protection to all but a handful of bills like budget reconciliation acts and fast-track trade proposals, a targeted supermajority vote requirement to waive a point of order may be less costly for opponents to use. Opponents using an UMRA point of order coupled with a supermajority voting requirement for waiver, for example, do not need to threaten to filibuster a bill – a threat that is less costly in the modern Senate than it was in previous decades[68] but still more costly than a point of order procedure that includes little or no debate and forces an immediate ruling and vote. In addition, a point of order enforcement scheme empowers one or a few lawmakers with intense preferences on a particular issues – such as a view that our federal system should vest substantially more power and responsibility at the subnational level than is likely given legislative dynamics. It is clear that some lawmakers do have strong preferences favoring substantial state and local authority and power; Lamar Alexander (R–Tenn.), the senator who pushed the change in 2005 to require 60 votes to waive an UMRA point of order, is one such lawmaker who characterizes himself as

[68] See Wawro & Schickler, *supra* note 32, at 259-61.

incapable of getting "over being Governor."[69] Others in the Senate share these preferences with differing intensities; keep in mind that 368 members of the 110th Congresses had some experience as state or local lawmakers before coming to Washington.[70] And a few anticipate that they may return to state office when they leave Congress.[71]

Even if only a handful retain their commitment to a particular vision of federalism that would recalibrate the balance to favor subnational governments more, they can use a framework law's point of order process to block or change proposals inconsistent with that vision. As long as they can command the support of a significant minority, senators can block enactment of provisions subject to a point of order enforced through a 60-vote supermajority requirement. Had the Senate retained the supermajority voting requirement when the Democrats took over with a slim majority, then the minority party could have effectively used this procedure to block change it opposed. Even when the rules allow only a simple majority to waive the point of order, the framework can be used to make issues more salient by forcing a vote on a particular provision that would otherwise be buried in an omnibus proposal. The ability to disaggregate provisions and force separate votes, even those determined by a simple majority, may be enough to kill the provision. Omnibus bills are usually the product of logrolling; although the bargains may survive targeted votes, it may also be the case that disaggregating the package and requiring separate votes will unravel the agreement.[72] Each provision in an omnibus bill may not alone command majority support even if the bill as a whole can pass the House

[69] 152 Cong. Rec. S1390 (daily ed. Feb. 16, 2006, 2006) (statement of Sen. Alexander). One wonders if he would have found it easier to get over his past had he been elected to a leadership position in the Senate; in 2006 he lost by one vote to Trent Lott (R–Miss.) in the election for minority whip.

[70] This figure is derived from the biographies of Congressmembers found in Congressional Quarterly's Politics in America 2008: The 110th Congress (2007). I considered local government experience to be service as mayor, member of city council, member of a school board, or county supervisor. State experience included state legislator, governor, lieutenant governor, attorney general, secretary of state, treasurer, tax commissioner or other "cabinet level" state official. See also Hero, *supra* note 34 (finding moderate levels of support by members of Congress for principles of federalism, but finding differences across delegations and finding support affected by ideology and party).

[71] Notable examples of politicians who have left national positions for state office are Jon Corzine of New Jersey, Bill Richardson of New Mexico, and Arch Alfred Moore, Jr. of West Virginia, all who became governors after service in Congress.

[72] See Glen S. Kurtz, Hitching a Ride: Omnibus Legislating in the U.S. Congress (2001) (describing use of omnibus bills to facilitate compromise).

or Senate. Special rules in the House keep such packages intact; a point of order that singles a provision out for a separate vote threatens that equilibrium.[73]

UMRA puts additional procedural hurdles in the way of unfunded intergovernmental mandates that exceed a certain threshold of direct costs. Other frameworks could apply similar procedures to other legislation that implicate federalism values, such as federal laws that preempt state or local requirements.[74] In these cases, a framework acts as a precommitment device to protect certain values of federalism through enhanced procedures. One question that arises with any precommitment device is what group of lawmakers is being bound by the framework? In the case of UMRA, the enactors sought to bind themselves and future Congresses. The need to bind themselves stemmed from the awareness of the pathologies discussed above that might lead Congress to pass more unfunded mandates than members would prefer. More importantly, UMRA's framework provided a way to demonstrate to voters that the Contract with America would be more than empty promises because it would include binding enforcement procedures. In this respect, the precommitment was more symbolic than real, since presumably those lawmakers would have attempted to keep their promise even in the absence of the disciplinary device. However, UMRA applies indefinitely, suggesting that lawmakers sought to entrench a particular vision of federalism beyond the 104th Congress, and perhaps beyond the period of Republican control.[75] In particular, the supermajority voting requirement, passed in a later Republican Senate, was intended to provide some assurance to those who are in the enacting Congress' (perhaps slim) majority that they could block enactment of certain proposals even if they can only muster the support of a minority. Recent Congresses have had razor-thin majorities, which means both that a member of today's majority may be in tomorrow's minority, and that the minority block is likely to be fairly strong. If the future majority wishes to avoid

[73] Another mechanism that can disaggregate logrolls is the line item veto power or its close cousin the enhanced rescission authority that had been provided to the President in a different framework law also growing out of the Contract with America, the Line Item Veto Act of 1996, Pub. L. No. 104-130. See Elizabeth Garrett, *The Story of* Clinton v. City of New York*: Congress Can Take Care of Itself*, in Administrative Law Stories 47, 56-57 (P. Strauss ed., 2005) (describing enhanced rescission).
[74] See *infra* text accompanying notes 127 through 129.
[75] For suggestions that such was the intent of the enacting Congress, see Committee on Federal Legislation, The Unfunded Mandates Reform Act of 1995, 50 The Record 669, 683 (1995); Angela Antonelli, *Promises Unfulfilled: Unfunded Mandates Reform Act of 1995*, Regulation, 1996, at 44, 45.

obstruction by a determined minority, it will have to repeal the entrenching aspect of the framework. Here, the supermajority voting requirement to waive an UMRA objection was repudiated as part of the conference agreement on a large omnibus concurrent budget resolution. In other cases, however, lawmakers may find repealing parts of the framework difficult if interest groups value it, remain vigilant, and can credibly threaten to punish those who vote for the repeal. Other supermajority voting protections in the budget process have proved more resistant to repeal.

UMRA may also represent an effort by one house of Congress to bind the other house. Past experience had demonstrated that the Senate was more inclined to enact unfunded mandates reform than the House, a state of affairs consistent with Professor Clark's view of the Senate as the key player in the constitutional scheme for lawmaking that provides some protection for the values of federalism.[76] Legislation proposing unfunded mandates reform had been adopted in the Senate in the 103rd Congress, but had been blocked in the House.[77] Thus, when both houses were controlled by the Democrats – as they were in that Congress – the Senate took the problem of unfunded mandates more seriously, in part because it was more ideologically conservative than the Democratic House and perhaps in part because of the difference in how states are represented in the Senate. When a shift in partisan control of Congress removed the obstacles to UMRA in the House, it is not surprising that the framework ultimately adopted more severely constrained the House than the Senate. Indeed, it essentially transformed the rules governing the House floor so that they resembled the Senate's floor process with respect to unfunded mandates. The House Rules Committee lost the power to waive UMRA points of order in a special rule governing debate on a bill with unfunded mandates, thereby allowing individual members to raise a point of order and force a separate vote on any unfunded mandate. Thus, UMRA may be an example of one house attempting to influence the outcomes in the other house before formal interchamber negotiations begin in conference committee.

[76] See Clark, *supra* note 1, at 1371-72 (discussing the effect of the Seventeenth Amendment on the influence of states in the Senate but noting the continued key role that the Senate plays in the constitutional scheme of lawmaking).
[77] See Conlan, et al., *supra* note 10, at 28-31.

One question about frameworks as precommitment devices is whether they really are enforceable. Frameworks are part of the internal rules of each house, albeit rules adopted as part of statutes. Either house can change its rules though a majority vote,[78] and both houses have ignored rules when enough members wanted to pass legislation that might be hindered by robust enforcement of disciplinary devices. UMRA's enforcement mechanisms have been invoked very infrequently in the past decade, and in only a few cases did the objection halt deliberation on the offending provision.[79] However, the effect of the point of order may well be felt before the bill reaches the floor, as legislation is changed by drafters and committees to avoid triggering a point of order when they are not confident they have the votes on the floor to waive the objection.[80] So merely analyzing the points of order and their outcomes does not provide a full picture of the influence of enforcement provisions. One question, to which I shall return in Part IV, is whether courts have a role, as Professor Clark urges they do with respect to constitutional procedures, to ensure that internal rules like those put in place by UMRA are followed by Congress.[81] Should a bill that has met the requirements of bicameralism and presentment nonetheless be subject to judicial challenge perhaps because a point of order that could have properly been raised never was?

D. Altering the Balance of Power in Congress

In many cases, drafters of framework laws intend to shift power within Congress because they believe the current institutional arrangements are part of the reason for the series of problematic decisions targeted by the framework.[82] Also, some drafters may hope to benefit from any change and thus support the framework for self-interested

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[78] Rules in the Senate may require supermajority support to change rules. See *infra* text accompanying note 96.

[79] See Gullo, *supra* note 38, at 562 (providing estimate of number of objections raised in first eight years). As discussed above, the two points of order raised in the Senate were sustained and killed the amendments. See *supra* text accompanying notes 40 through 43. In addition, one point of order raised early in the House was sustained, although the point of order was probably improperly asserted. See Garrett, *Enhancing Safeguards*, *supra* note 61, at 1144-45.

[80] See GAO, Coverage, *supra* note 9, at 19 (quoting lobbyist for National League of Cities: "This is like a shoal out in the water. You know it is there, so you steer clear of it.").

[81] See *infra* text accompanying notes 131 through 148.

[82] For an analysis of the budget framework as a way to shift power within Congress, see D. Roderick Kiewiet & Mathew D. McCubbins, The Logic of Delegation: Congressional Parties and the Appropriations Process Chap. 4 (1991). See also McNollgast, *The Political Economy of Law*, in 2 Handbook of Law and Economics 1651, 1683 (A.M. Polinsky & S. Shavell eds., 2007, forthcoming) ("[M]uch of the legislative process involves attempts to mitigate the problem of delegation inside the legislature, principally to committees and party leaders.").

reasons. UMRA clearly has shifted power away from committees in Congress, although it is not as clear where the power moved. It appears to have strengthened centralized entities in Congress, as well as empowering individual members on the floor of the House and the Senate. In addition, the temporary change in Senate rules to add the teeth of a supermajority voting requirement to the UMRA point of order procedure strengthened substantial minority blocks in the Senate.

If decisions concerning unfunded mandates suffer from the pathologies described above, those pathologies may be particularly acute in congressional committees, the place where most decisions about whether to use unfunded mandates to achieve policy goals are made. The committee system works, in part, because of its members have particular interests in the subject matter of the committees on which they sit. Members are willing to invest significant time in committee work to develop expertise in a specialized arena because they are especially motivated to do so, perhaps because their constituents are especially affected by the committee's decision or because of their personal interest in the topic.[83] Other lawmakers will defer to the committee because of its members' greater knowledge, but they will also be aware that the preferences of the median lawmaker may diverge from the preferences of committee members. Although there is disagreement about how representative congressional committees are of the preferences of the larger membership,[84] it is clear that party leaders are aware of the possibility of divergence in preferences and use various methods to ensure that committees do not stray too far afield.

Framework laws are a way to shift the balance of power away from committees when other lawmakers are concerned enough about the divergence to bear the higher costs of monitoring or disciplining committees. In the case of unfunded mandates,

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[83] See Keith Krehbiel, Information and Legislative Organization (1991); Arthur Lupia & Mathew D. McCubbins, *Who Controls? Information and the Structure of Legislative Decision Making*, 19 Legis. Studs. Q. 361 (1994).

[84] Compare Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. Pol. Econ. 132 (1988); Glenn R. Parker, Congress and the Rent-Seeking Society 74-81 (1996) (both arguing that committees will consist of preference outliers because of distributional politics), with Gary W. Cox & Mathew D. McCubbins, Legislative Leviathan: Party Government in the House Chapter 8 (2d ed. 2007) [hereinafter Cox & McCubbins, Leviathan]; Krehbiel, *supra* note 83 (both arguing that committees are largely representative but providing different views of the importance of the party structure in Congress). See also Kiewiet & McCubbins, *supra* note 82, at 100-31 (analyzing make-up of House appropriations committee and subcommittees and finding committees to be relatively representative); Cox & McCubbins, Leviathan, *supra*, at 201 ("Self-selection … is only half the story. The other half, equally important, is the regulator effort of each party's committee on committees).

lawmakers may fear that the temptation to use unfunded intergovernmental mandates to achieve policy objectives passionately supported by committee members is so great that the substantive committees will inevitably adopt substantially more than the optimal level of such mandates. More concretely, members on the House Committee on Natural Resources may value certain environmental policies so strongly that they discount too heavily the values of a more robust system of federalism. If they can more easily enact certain policies by passing the responsibility for funding them to states and localities, they will do so even when that funding decision is inefficient, not in the best interest of a federal system, or both.

UMRA constrains congressional committees in several ways. First, it vests the power of identifying intergovernmental mandates and determining their direct costs in the Congressional Budget Office, a centralized entity that has stronger ties to congressional party leaders and the budget committees than to the authorization committees.[85] The data on intergovernmental mandates that the CBO provides is crucial under the framework because the availability of some points of order on the floor depends on whether direct costs of an unfunded mandate exceed a statutory threshold. Because there is substantial discretion in how one interprets and gathers the data, a self-interested committee could manipulate a cost statement to avoid triggering further enforcement. CBO, on the other hand, is more responsive to the congressional leadership and the body as a whole. Moreover, CBO directors and staff have zealously protected their reputation as nonpartisan experts with professional reputations that depend on the credibility of the information they produce. The well-respected chief of the State and Local Government Cost Estimates Unit, Theresa Gullo, has held that position since enactment of UMRA, serving throughout several changes in the partisan control of Congress.[86] Certainly, CBO faces some political pressures – and a CBO Director appointed by Republicans is likely

[85] See The Committee on Federal Legislation, *supra* note 75, at 685 (finding this to be problematic because it "gives enormous discretion to the … CBO, which will provide the fiscal data that supports or refutes a challenge to a mandate").

[86] Most CBO staff like Gullo are professionals who remain in their positions, notwithstanding partisan shifts in Congress; she began working at CBO as a federal budget analyst in 1985 and has been the chief of the State and Local Government Cost Estimates Unit for the entire period that UMRA has been effective. The CBO director is appointed for a four year term, so he is also somewhat insulated from partisan politics; since the creation of CBO in the mid-1970s, CBO directors have worked to avoid being identified as part of partisan politics.

to have different views and reach different conclusions on some issues than a CBO Director appointed by Democrats – but he and his staff may well be seen as a more faithful agent of the average legislator, than committees, when it comes to unfunded mandates.

The power taken from committees has gone to other congressional players – in this case, individual members and party leaders.[87] The ability to object to consideration of unfunded mandates on the floor of both houses tends to shift control to individual members of Congress, at least those who can command majority support in the House or – for a short time – support of 40 others in the Senate. The point of order allows members to unravel deals struck in committee, and in the House it undermines the ability of the Rules Committee to further protect such deals through special rules limiting amendments or waiving points of order. This again can be seen as an indication that the full body had lost some trust in its agents, the committees. In David Epstein and Sharyn O'Halloran's study of delegation, they identify the use of restrictive rules as a measure of trust in the committee to produce proposals that will reflect the floor's preferences.[88] In other words, the floor will not demand to be as active in crafting a proposal, and will accept more restrictive rules, if it can trust that the committee's output will not diverge substantially from the preference of the median legislator.

The amount of power shifted to party leaders by UMRA differs according to the context.[89] To the extent that committee chairs can otherwise establish independent power bases,[90] a framework like UMRA that empowers centralized entities tends to work to the advantage of party leaders. However, the House Rules Committee has long been closely associated with party leaders, so the weakening of its control over House floor

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[87] For discussion of the shift in power away from committees generally, see David W. Rohde, Parties and Leaders in the Postreform House (1991).

[88] David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Approach to Policy Making Under Separate Powers 182-83 (1999). See also Garrett, *Purposes*, *supra* note 4, at 759-62 (discussing similar uses of frameworks to remove power from committees that other legislators no longer trusted as faithful agents).

[89] Cf. Mathew D. McCubbins, *The Legislative Process*, *in* The Encyclopedia of Democratic Thought (P.B. Clarke & J. Foweraker eds., 2000) (noting that procedures delegate power to allow the front-bench and back-bench to check each other); McNollgast, *supra* note 82, at 1685 (describing how procedures provide checks and balances among players in Congress, including party leaders, committee chairs and members).

[90] With the weakening of seniority as the primary basis for appointing committee chairs in the last decades, the power of the chair that is independent from the party leadership has also weakened. See Cox & McCubbins, Leviathan, *supra* note 84, at 52-54.

deliberations may also reduce the power of those leaders. Typically, parliamentary devices such as points of order have been mechanisms to strengthen the control of party leaders over the floor because the meaning of procedural votes is often relatively opaque to constituents.[91] Thus, leaders can call on party loyalty to gain support on procedural votes when members might not support them on a vote on final passage. In contrast to other procedural devices, such as some of the very obscure budget points of order,[92] UMRA points of order are much more straightforward, and the groups that care about unfunded mandates – members of the intergovernmental lobby – are relatively sophisticated observers of the legislative process. So it seems unlikely that UMRA procedures can be used to hide decisions from voters in the same way that other procedures can.

Finally, the effect on the power of party leaders depends on the way in which a point of order is raised. When raised to strike an unfunded mandate that is part of a larger bill negotiated by party and committee leaders as a comprehensive package designed to attract majority support (or supermajority support to survive a filibuster in the Senate), then the objection is contrary to the interests of leadership. On the other hand, the Senate's temporarily-strengthened point of order was used to defeat attempts to add nongermane provisions to appropriations bills on the floor of Congress. In such cases, the ability to rule such amendments out of order with only 41 votes allowed party and committee leaders more control over the fate of their legislative product once it reached the Senate floor, where nongermane amendments can typically be considered and adopted. Senators have long used nongermane amendments to bring issues to the floor that committees have blocked or leaders have refused to schedule for deliberation.[93] Thus, any parliamentary device that can allow leadership to more easily defeat such attempts increases its power.

To conclude, UMRA has clearly resulted in some changes in the balance of power in both bodies. Committees have lost power with respect to unfunded intergovernmental

[91] See Gary W. Cox & Mathew D. McCubbins, Setting the Agenda: Responsible Party Government in the U.S. House of Representatives 29 (2005) [hereinafter Cox & McCubbins, Agenda].
[92] See Dauster, *supra* note 31, at __ (describing the particularly convoluted Byrd Rule in the reconciliation process).
[93] See Martin B. Gold, Senate Procedure and Practice 104-07 (2004) (describing how nongermane floor amendments are a route around committees and leadership to bring issues directly to the floor).

mandates. On balance, party leaders have probably gained some power, but not as much as they have under other frameworks, like, for example, the congressional budget process. Individual members have more power to play a meaningful role in floor deliberations, although in the House they can succeed in challenging unfunded mandates only if they have the support of a majority. In the Senate, determined minorities can block consideration of unfunded mandates, but the result of the process in this body is more mixed. Leaders could also use the supermajority vote requirement when it was in effect to keep members from adding nongermane unfunded mandates to appropriations and other important bills, even if those amendments could garner majority support.

III. UMRA as a Framework Statute

Frameworks could also achieve these purposes, at least in part, if they were adopted through simple resolutions as changes in the internal rules of the House and Senate. In fact, Congress purports to view frameworks enacted through statutes and those enacted through vehicles involving only the relevant house (e.g., a simple resolution) as equivalent. When frameworks such as UMRA are enacted as a statute, Congress is usually careful to state explicitly that each house is exercising its authority under the Constitution to "determine the Rules of its Proceedings."[94] The framework statute will typically emphasize the "full recognition of the constitutional right of either House to change such rules (as far as relating to such House) at any time, in the same manner, and to the same extent as in any case of any other rule of each House."[95] In the Senate, once the framework law is enacted it remains in place until the Senate changes or repeals it (presumably in either a statute or a simple resolution). In this way, a framework law is no different than the Standing Rules of the Senate, which remain in effect from session to session because the Senate is a continuing body.[96] The House

[94] U.S. Const., Art. I, §5.
[95] Unfunded Mandate Reform Act of 1995 § 108, 2 U.S.C. § 1515.
[96] Some have argued that this feature of Senate rules is unconstitutional because it allows past Senates to impermissibly bind future ones, particularly because amendments to the Senate rules can be filibustered and require a two-thirds vote for cloture. See, e.g., John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J. L. & Pol. 505, 520-38 (2004) (although first concluding that any rule can be changed by majority vote). Nonetheless, whatever the validity of the reason, Senate rules are not readopted each session, in contrast to the House. Moreover, the Senate's recent decision to depart from the supermajority voting requirement with respect to UMRA points of order and return to a simple majority vote to overcome an objection occurred in the context of a legislative vehicle that cannot be filibustered, the concurrent budget resolution.

adopts its rules at the beginning of each new session,[97] and it treats framework laws as it does other internal rules, clarifying in the resolution putting House rules in place that rules contained in previously-enacted framework laws are readopted.[98]

As I have discussed previously,[99] despite these indications that the two forms of rules are functionally equivalent, the choice of form for frameworks cannot be a matter of indifference to Congress. Using the statutory form increases the costs of adopting the reform by multiplying the legislative hurdles that must be overcome before the rules take effect. Statutes must meet bicameralism and presentment; simple resolutions need not. The statutory form for framework rules also likely increases the chance that courts may decide to enforce the provisions. Although courts have declined to treat statutized rules differently, finding enforcement a nonjusticiable political question,[100] at least some scholars are arguing that this result is not inevitable.[101] We will return to this latter possibility – and whether it is a desirable aspect of framework statutes – in Part IV. For now, let us focus on the initial question: Why did Congress choose the statutory route to enact the legislative provisions of UMRA?

A. Symbolism and Path Dependency

One reason for the use of a statute was to symbolize more concretely the success in enacting a provision in the Contract with America. The Contract had bound House Republicans to bring ten bills to the floor within the first 100 days of the 104th Congress "each to be given a clear and fair vote."[102] The Contract emphasized that it was a written,

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[97] Although this provides the House an opportunity for substantial revision of the rules every two years, the changes are largely incremental, and the basic structure of the House has been largely unchanged since the adoption of the so-called Reed's rules in the 1880s. See Cox & McCubbins, Agenda, *supra* note 91, at 75-76. This suggests that procedures enacted through internal resolutions are relatively durable even though not adopted as statutes; at the least, there is certainly no theoretical difference in the durability of the two forms of rules, and there may be little practical difference.

[98] See, e.g., H.R. Res. 5, §1, 108th Cong., 1st Sess., 2003 (re-adopting "all applicable provisions of law… that constituted the rules of the House at the end of the One Hundred Seventh Congress").

[99] See Garrett, *Conditions*, *supra* note 6, at 307-10.

[100] See, e.g., Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982). See generally Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 Cal. L. Rev. 1341 (1990).

[101] See, e.g., Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 Neb. L. Rev. 960, 973-76 (2007). See also Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1779-87 (2002) (arguing that another framework law is unconstitutional to the extent that the statutized form purports to bind future Congresses to certain rules of proceeding).

[102] Republican Contract with America, *supra* note 48.

binding commitment – thus, the symbolism of using a statute, passed in the traditional way that all legislation is passed, was important in signaling to voters that lawmakers had met their pledge in an especially meaningful way. In other words, including the reform in the Contract with America essentially made the statutory route of adoption necessary.[103] This was a strategy not entirely without risk, because the President was a Democrat. President Clinton was unlikely to stand in the way of unfunded mandate reform, however, because he had supported it as a former governor and as part of his effort to move the Democratic Party more toward the center of the political spectrum. Although Title I's disclaimer clause made it clear that its provisions were the same as any other exercise of rulemaking authority and could be changed without going through the costly route of repealing a statute, voters were unlikely to know about this provision or understand it. Thus, it would not have detracted much from the force of the symbolism.

Another factor that led to the statutory form was UMRA's close relationship to the congressional budget process. UMRA relies heavily, as we have seen, on procedures modeled after those of the budget process. It focuses on producing and disseminating information and delegates the main informational duties to a unit of the CBO, an entity created by the 1974 Budget Act. It enforces its provisions governing the legislative process with points of order similar to budget points of order, even adopting for a brief period supermajority voting requirements in the Senate explicitly modeled after the disciplinary devices in the budget arena. As with other frameworks in the fiscal arena, the choice of statute may well be a matter of path dependency to reduce the transaction costs associated with uncertainty, although it comes at the price of the greater transaction costs of enacting a statute rather than an internal resolution.[104]

B. Enacting Reform as a Package

The most important reason for the use of a statute, however, is the close connection between reform of the legislative process governing intergovernmental

[103] This conclusion is somewhat different than my previous conclusion that "none of the [symbolic] messages that might be communicated through the use of the statutory form seem to require this method of adoption for the signal to be expressed." Garrett, *Conditions*, *supra* note 6, at 312. Although that statement seems generally accurate, the background of the Contract with America changes the political situation for adoption of UMRA.

[104] See Garrett, *Conditions*, *supra* note 6, at 317.

mandates and regulatory reform directed to executive branch agencies.[105] The second part of unfunded mandates reform had to be enacted as a statute because it required Congress to take action with legal effect.[106] Thus, if both components of reform were seen as a package that had to be adopted simultaneously, then both components had to be in a statute. For supporters of unfunded mandates reform – intergovernmental interest groups, politicians, and voters – regulatory reform was always viewed as a necessary part of a comprehensive solution. Indeed, for many, the main culprit in liability shifting was the executive branch that implemented congressional directives through burdensome regulations. For example, the lobbying effort that set the stage for adoption of UMRA emphasized the mandates placed on states and localities by the federal government as a whole, not just Congress. The 314-city survey released on National Unfunded Mandates Day focused on ten mandates traced to particular legislation passed by Congress, such as the Clear Air Act, the Endangered Species Act, and the Americans with Disabilities Act, but many of the specific requirements about which the subnational governments complained were imposed in regulations adopted pursuant to those laws.[107] Furthermore, the Contract with America linked unfunded mandates reform to other regulatory reform, including requiring agencies to engage in risk assessment/cost-benefit analysis before adopting rules and strengthening the Regulatory Flexibility Act.[108]

Many of the congressional supporters of UMRA were as concerned about regulatory mandates – and perhaps even more concerned with agency action, especially

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[105] If one of the purposes of UMRA was for the Senate to ensure a change in House procedure, see *supra* text accompanying notes 76 and 77, a statute would not be required to coordinate the rules changes in each house. Instead, the houses could have used a concurrent resolution, which must be passed in the same form in each house (and can be the subject of a conference committee) but need not be signed by the President.

[106] In addition, Title III, delegating authority to the Advisory Commission on Intergovernmental Relations (ACIR) to produce several studies on existing mandates required statutory enactment (or adoption through an executive order). This provision was not a key part of the ultimate package, however, but is more accurately seen as a gesture toward those who argued (accurately) that UMRA did nothing to reduce the burden of previously enacted federal mandates or previously adopted regulations imposing mandates. It soon became clear that the work of ACIR was not considered particularly important by Congress. After producing one report and a preliminary draft of a second, ACIR was provided virtually no funding and directed to terminate its operations, which is did at the end of fiscal year 1996. See Gullo & Kelly, *supra* note 35, at 386.

[107] See, e.g., Price Waterhouse, *supra* note 45, at A-5 (discussing implementation of the Endangered Species Act by various agencies) & B-1 (describing actions by the Environmental Protection Agency under the Superfund law). See also Conlan, et al., *supra* note 10, at 25-26 (detailing costs of rules in description of the movement against unfunded mandates).

[108] All these are listed as Provision #8 in the Contract, "The Job Creation and Wage Enhancement Act." See Republican Contract with America, *supra* 48.

after the Republican takeover of Congress which allowed them more influence over the substance of new legislation. Conservatives have long argued that agencies have strong incentives to discount the costs of regulation on subnational governments and private entities, and therefore to adopt more regulations than are socially optimal. This concern links to the arguments made by Bradford Clark, who is wary of regulatory policy as likely to trench inappropriately on state and local autonomy because it has not gone through the constitutional requirements for lawmaking.[109] Similarly, the argument is made that agencies will adopt too many burdensome regulations, which could not pass cost-benefit analysis, because they are so committed to the policy outcomes in the areas they oversee.[110] Moreover, Congress cannot necessarily rein regulators in because lawmakers with outlying preferences that mirror the agencies' can block restraining legislation as long as they control key vetogates, like committees.[111] If the President supports the agencies, then only a supermajority in Congress can change the policy because he would veto any law forcing agencies to back down. Of course, this picture overlooks other subtle ways that Congress can influence agencies (appropriations, oversight, jawboning), but it does describe some agency decision making. Certainly, it provides a view that many Republicans, especially in the House, held when they began to consider unfunded mandates reform. For them, legislative reform alone would be incomplete – and perhaps miss the primary target of reform entirely.

One way to satisfy this group of lawmakers, and the interests they represented, would be to pass reform in three parts – a simple resolution in each house to change the internal rules of the House and Senate and a statute to impose regulatory reform. But that raises the specter that only some parts of the comprehensive reform would pass. Unlike other framework laws where the desire to pass one comprehensive package drives the choice of using a statute, supporters of UMRA were not being asked to take the bitter with the sweet. They supported all parts of the reform agenda – provisions affecting the

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[109] Clark, *supra* note 1, at 1430-33.

[110] See, e.g., William Niskanen, Bureaucracy and Public Economics (1994); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982). It is important to note that Title II treats costs imposed by major regulations on the private sector in much the same way as it did intergovernmental mandates. Title I included some provisions relating to "private sector mandates" (its term for regulations), but most of the internal enforcement was directed toward unfunded intergovernmental mandates only.

[111] See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L.J. 523 (1992).

legislative branch as well as those affecting the executive branch. In contrast, other examples of reform frameworks involve the legislature taking steps it is not eager to accept in return for the executive branch also agreeing to restraint.[112] UMRA proponents were threatened, instead, by the prospect of incomplete reform. They might have worried that if they passed the provisions affecting legislative procedures as two simple resolutions (or even a jointly-adopted concurrent resolution to coordinate action between the houses), then support for regulatory reform would drop off as lawmakers less enthusiastic about restrictions on agencies could argue that congressional reform was sufficient and they need not also vote for the second part of reform. Title II of UMRA, the provisions affecting agencies, presented the more contentious issues for the conference committee, with disagreement over the scope of judicial review[113] and concern that lawmakers who were opposed to environmental regulation were using UMRA as a smokescreen to hide an attack on the Environmental Protection Agency (EPA) and similar agencies.[114] Thus, there was reason to be concerned that regulatory reform would face significantly more opposition than other provisions in UMRA. Certainly, there might have been substantial delay in adopting regulatory reform.

Another group of lawmakers may also have demanded that both parts of this package be enacted together, necessitating use of the statutory form. In a way, this is the flip side of the dynamics described above. Lawmakers who were not as keen about regulatory reform might have supported enactment of the full package at one time to obscure, from at least the relatively inattentive public, that Title II had little teeth. Although passionate advocates of far-reaching reform might have hoped for more, they realized that this was the most they were likely to get from Congress, particularly with a Democratic President who had an ambitious regulatory agenda; thus, they were also willing to accept a package that could hide the extent of their compromise. When one

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[112] See Garrett, *Conditions*, *supra* note 4, at 313-14 (describing early budget reform proposed in two vehicles, where the President vetoed the executive branch provisions after Congress had already adopted its internal reforms).

[113] 141 Cong. Rec. S3877 (daily ed. Mar. 14, 1995) (statement of Sen. Kempthorne).

[114] See, e.g., Environmental Research Foundation, Rachel's Environment & Health News #396, Unfunded Mandates (June 29, 1994) (contending that an "environmental war" was being waged under the banner of unfunded mandates), at http://www.rachel.org/bulletin/pdf/Rachels_Environment_Health_News_731.pdf; Craig L. Infanger, *Environmental Regulatory Reform and the Unholy Trinity: Unfunded Mandates, Risk Assessment, and Property Rights*, 28 J. Agri. & App. Econ. 108, 109-11 (1996).

compares Title I of UMRA – concerning the legislative process – with Title II – concerning agencies – it is striking how much less detailed Title II's provisions are. The more moderate Senate prevailed in conference to pare back the judicial review requirements in Title IV so that parties could challenge a regulation only if the agency failed to provide a mandates statement; no challenge to the substance of the statement is allowed. Moreover, the only remedy is to force the agency to prepare a statement or augment one. Failure to prepare a statement or a determination that a statement is inadequate cannot be a "basis for staying, enjoining, invalidating or otherwise affecting such agency rule."[115]

In the end, Title II of UMRA is generally viewed as ineffective and largely irrelevant. There are significant gaps in coverage; UMRA does not apply to independent agencies, for example.[116] The EPA quickly determined that the Clean Air Act precluded it from considering the factors relevant to an UMRA statement and therefore it did not have to comply with UMRA with respect to some major regulations.[117] Under UMRA, the requirements of the organic statute trump its procedural requirements. There is little enforcement of Title II, unlike the internal disciplinary devices set up in Title I for the legislative process. Finally, much of what UMRA required was already mandated by executive orders governing the regulatory process. So UMRA has done little by way of requiring additional or more comprehensive information.[118] It may be the case that the most important effect of the regulatory reform provisions in UMRA was ensuring that the framework traveled the statutory route; after enactment, Title II's influence on the regulatory process has been minimal, at best.

IV. Challenges for Federalism Frameworks

This exploration of UMRA has provided insight into framework laws generally by providing a concrete example that can illustrate some of the purposes such laws serve and demonstrate why some congressional procedures are adopted in statutory form. It has also filled out the picture of the "finely wrought" and "considered" (even if not

[115] Unfunded Mandate Reform Act of 1995 § 401(a)(3), 2 U.S.C. § 1571.
[116] GAO, Coverage, *supra* note 6, at 26.
[117] See Gullo & Kelly, *supra* note 35, at 386; GAO, Little Effect, *supra* note 9, at 17.
[118] See GAO, Little Effect, *supra* note 9, at 20-22. Agencies also have a poor track record with respect to compliance with executive orders dealing with federalism. See Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 782-86 (2004).

always exhaustively so) procedures that a statute in this arena must travel. Unlike the constitutional provisions that Professor Clark extols, UMRA is targeted to make more arduous the path of enacting certain laws that pose a particular threat to federalism. However, we are left with at least two questions. First, why limit the procedural obstacles contained in UMRA only to unfunded intergovernmental mandates and not other types of laws that implicate federalism? The possibility of broader coverage for a framework turns in large part on whether lawmakers could describe the set of bills that would trigger the framework generally, before they know the precise details of the proposals that should be subject to the rules. Second, should courts enforce procedural frameworks like UMRA in the same way that Clark encourages them to do with respect to constitutional separation of powers? The enactors of UMRA not only assumed that judicial enforcement of the legislative provisions would be inappropriate, but they explicitly provided for judicial review only of violations of Title II's regulatory provisions. Others have argued that more aggressive judicial review of internal rules, even those passed as statutes, implicates constitutional concerns. From my perspective one important problem with limited judicial review is that it would make Congress less likely to adopt frameworks in the first place, denying the legislature the ability to use frameworks to achieve worthwhile purposes.

A. Identifying the Scope of Coverage for Federalism Frameworks

One necessary condition for Congress to address a problem through a framework law is that lawmakers must be able to identify a relatively concrete problem and then describe it with enough specificity so that the framework can be triggered in the right circumstances.[119] This specification has to occur when the framework is passed and before lawmakers are sure which bills may fall within its scope in the future. This condition for frameworks is particularly important with respect to rules entrenching particular outcomes that are less likely to occur in the absence of a framework. Take UMRA as an example. The concern, as we saw above, is that Congress will systematically enact more unfunded mandates than is socially optimal because of a fiscal illusion. UMRA is therefore triggered whenever there is a significant unfunded intergovernmental mandate, and its procedures make it harder for lawmakers to pass such

[119] Garrett, *Conditions*, *supra* note 6, at 296.

a mandate. If Congress had to decide to apply more onerous procedures on a bill-by-bill basis, then lawmakers, tempted by the allure of shifting the funding for a particularly policy to states and localities, would be unlikely to agree to the enhanced procedures. The more information lawmakers have about the particular bill, often the less likely they will be to apply additional procedures. So it is important to put a framework law into effect that will apply to future decisions before lawmakers have a clear idea which policies they support may be stymied by the framework. In short, they must operate behind a partial veil of ignorance.[120]

Of course, this reality presents a challenge for drafters of frameworks. They have to be able to describe generally the set of bills that they want to fall within the scope of the framework before they have a detailed knowledge of those particular proposals. Thus, they need some information about the problem they are targeting, but not so much that self-interest stands in the way of formulating an effective framework. Vermeule terms this the information-neutrality tradeoff.[121] To succeed as a precommitment device, drafters of a framework must have sufficient information about the problem, the contexts in which it is likely to develop, and behavior that may be used to evade the framework so that they can craft a sufficiently precise description of its coverage. One challenge for frameworks in the context of federalism is to define the scope of the framework with enough specificity so that it includes all the proposals likely to be problematic. A framework that purports to apply to all laws "implicating federalism" or some other vague phrase would be unworkable. UMRA targeted one group of bills likely to be especially threatening to the principles of federalism – unfunded intergovernmental mandates – but it leaves unaffected arenas with significant implications for the federal system and that could be defined with sufficient precision, like laws using conditions of federal assistance to produce certain outcomes in states, or laws preempting state or local

[120] This concept is derived from John Rawls, A Theory of Justice 118-23 (rev. ed. 1999). It is an important aspect of Elster's analysis of constitutions as commitment devices. Jon Elster, Ulysses Unbound 130-33 (2000). The partial veil of ignorance idea has been developed in other contexts by legal scholars. See, e.g., Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917 (1990); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399 (2001). I also discuss it in the context of frameworks providing neutral rules for certain decisions. See Garrett, *Purposes*, *supra* note 4, at 736-41.

[121] See Vermeule, *supra* note 120, at 428-29.

regulation that do not already trigger the provisions of UMRA.[122] Let us look at each of these possible framework laws.

UMRA's coverage has been criticized as too limited even to effectively deal with the problem it purports to attack: federal laws that shift significant direct costs to states and localities. The largest gap in this respect identified by critics is the failure to cover laws imposing requirements on states as conditions of federal assistance.[123] It is not clear that conditions of assistance present as serious a problem for federalism as unfunded intergovernmental mandates because they are accompanied by at least some federal funding, albeit perhaps not sufficient to defray all the costs imposed on subnational governments. Nonetheless, using conditional assistance to effect policy will not be as tempting to federal lawmakers as unfunded mandates are because they must come up with at least some of the money for the policy. Some also argue that conditional assistance is not as problematic because states can always avoid the conditions by turning down the money, but this argument is not compelling. Walking away from federal funding because of onerous conditions is not a realistic option for many states, however, that need the funds for their schools, infrastructure, homeland security, and other purposes.[124]

One federalism framework proposed after enactment of UMRA, The Federalism Act of 1999, targeted only a subset of conditions: "any provision that establishes a condition for receipt of funds under the program that is not related to the purposes of the program."[125] The Federalism Act thus targeted so-called "crossover sanctions," but it did not include in its coverage a second set of conditions often equated with mandates: "crosscutting requirements" that apply "generally applicable requirements across the board to further various national social and economic policies."[126] Presumably, however, Congress could draft a framework that applied to both sets of conditions if it wanted to. Such a framework could be crafted using UMRA as a model; it could require information

[122] For example, preemption of state taxing authority might trigger UMRA; preemption of state laws regulating women's reproductive freedom will not. Both have implications for federalism.
[123] See, e.g., GAO, Coverage, *supra* note 9, at 22-25; Gullo, *supra* note 38, at 568-69.
[124] See Garrett, *Enhancing Safeguards*, *supra* note 61, at 1127.
[125] See The Federalism Act of 1999, H.R. 2245, 106th Cong. (1999).
[126] U.S. Advisory Commission on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact, and Reform 7-10 (1984). See also Michael Fix & Daphne A. Kenyon, *Introduction*, *in* Coping with Mandates: What are the Alternatives? 1, 3-4 (M. Fix & D.A. Kenyon eds., 1990).

about the various types of conditions and identification of any funding provided to offset the costs. Enforcement could be provided by points of order. A member could raise an objection if the bill was not accompanied by a statement about the conditions of assistance when it came to the floor, and a different objection could be raised if the statement indicated the condition was not sufficiently funded by the federal assistance provided in the bill. Waiver of the points of order could occur by majority or supermajority votes.

Another set of legislation is often viewed as particularly problematic for a robust system of federalism: federal laws that preempt state laws. Again, a framework could be crafted to cover these laws because this is a specifically concrete problem to lend itself to ex ante specification; indeed, the proposed Federalism Act of 1999 would have adopted special procedures for bills that preempt state or local government authority. Under the provisions of this proposal, committees, including conference committees, would have to identify any provision in a legislative proposal that preempted state or local government regulation. Then the CBO Director would be required to prepare a federalism impact assessment that would describe the preemptive effect of the law and any costs imposed on subnational governments.[127] The committee report would include this assessment, as well as identify preemptions and provide a constitutional basis and justification for each preemption.

The challenge with this sort of framework is enforcement. Although its parameters and doctrine are subject to disagreement, preemption is a definite enough concept that the scope of the framework law can be described sufficiently before any particular law is under consideration. But what happens if Congress simply does not identify the preemption and enacts the law anyway? Maybe someone will object, and the objection will be waived, or maybe no one objects. Interestingly, in either case courts might provide the discipline. With a legislative framework in place designed to specifically identify and to provide information about the existence and extent of a

[127] It is not clear to me that the CBO or the committee itself is the best entity to describe the preemption and its constitutional basis, although certainly CBO is the right entity to provide cost estimates. In earlier work, Adrian Vermeule and I have suggested a framework law to deal with constitutional issues implicated by legislation and described a specialized staff that might provide expertise in analyzing bills. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L.J. 1277, 1317-19 (2001) (proposing an Office for Constitutional Issues).

preemption, courts could more appropriately apply rules of statutory construction that require express preemption before interpreting a federal law to preempt state law.[128] In other words, if the text is ambiguous and there is no identification of the preemption in a committee report and accompanying federalism impact statement provided before floor deliberation, then the court could refuse to find any preemption and construe the provision in favor of state authority. Similarly, an agency interpreting the statute as it promulgates regulation would not preempt state or local regulation unless Congress had expressly provided for such a preemption.[129] The Federalism Act took this approach by enacting special rules of construction relating to preemption and prohibiting interpreters from finding a preemption unless it was expressly set forth in the statute or the federal statute directly conflicted with a state law in such a way that the two "cannot be reconciled or consistently stand together."[130] Although the Federalism Act limited the search for preemption to the text, the framework law could instruct courts to search both the text and certain kinds of legislative history, such as the federalism impact assessment.

This kind of a framework involves the judicial branch in enforcement by mandating certain canons of construction and thereby affecting how statutes that fall within the scope of the framework are interpreted. It rely on clear statement rules and other techniques of statutory interpretation to help ensure that Congress focuses on the particular issue and addresses it expressly and clearly in the text and an accompanying federalism statement. In that way, the framework makes even more salient an issue that some courts have tried to bring to Congress' attention through the use of clear statement rules. Also, to the extent that the framework itself directs courts to apply clear statement rules, as the Federalism Act did, it reduces the chance that judges and courts will adopt different interpretive strategies, thereby diluting the disciplining effect of any clear statement rule. But this type of judicial enforcement does not require that courts get into

[128] See Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1 (2007) (arguing in favor of a clear statement of express preemption because it would better ensure congressional attention to and vigorous debate of issues involving state regulation, and describing the current state of the jurisprudence as inconsistent).

[129] For a discussion of the current interpretive practice relating to agencies and preemption, see Mendelson, *supra* note 118, at 743-55. See also Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A Guide to Judicial and Political Review of Federal Agencies 55, 73-75 (J.F. Duffy & M. Herz eds., 2005) (discussing use of clear statement rules in judicial review of agency interpretations).

[130] The Federalism Act of 1999, *supra* note 125, at § 9(a).

the business of enforcing Congress' own internal rules. That is the second challenge to which we turn now.

B. Judicial Enforcement of Framework Laws

Congress clearly does not envision that rules it enacts as part of a statute will be the subject of any sort of judicial review. That is one reason for the disclaimer clauses in most framework laws, identifying the provisions affecting the legislative process as exercises of each house's rulemaking authority under the Constitution and susceptible to unilateral change at any time. In the description of the conference report on UMRA, Senator Kempthorne stated confidently, in describing the judicial review section of Title IV: "Title I deals with the requirements of Congress, and judicial review is not appropriate for the internal actions of Congress."[131] Part of the reason for the absence of judicial review is that internal rules of Congress do not have legal force and effect, a fact that is clearly evident when they are passed through simple or concurrent resolutions, which do not meet the constitutional requirements for lawmaking. In *INS v. Chadha*, the Court noted that exercise of the rulemaking authority is an exception to the requirements of bicameralism and presentment because it "only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances."[132]

The proposition that internal rules are not statutes even if contained in framework legislation does not entirely answer the question of whether courts have an appropriate role to play in their enforcement. First, if Congress were to adopt a rule that violated another constitutional provision, including those setting out certain procedures to govern the legislative branch, judicial review might well be appropriate.[133] But the issue here is different from a question of whether the framework law itself is constitutional.[134] The

[131] 141 Cong. Rec. S3877 (daily ed. Mar. 14, 1995) (statement of Sen. Kempthorne).
[132] 462 U.S. 919, 956 n.21 (1983).
[133] See Miller, *supra* note 100, at 1348-51.
[134] There might be an argument that any supermajority votes to waive a point of order violate the Constitution which arguably requires only majority votes to pass legislation in the absence of a specific constitutional mandate otherwise. See Bruce Ackerman, et al., *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539 (1995) (arguing against the constitutionality of an internal House rule requiring a three-fifths vote to pass tax increases); John McGinnis & Michael Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 484 (1995) (defending the rule's constitutionality).

issue is whether a court should entertain the argument that Congress did not comply with its own rules when it debated and enacted a particular law, with a possible remedy of voiding the law entirely.[135] Further, does one's view of the right answer to that question change if the rule was passed as part of a statute, with the participation of the other house and the President? I am not interested here in the descriptive aspects of this question, i.e., whether the courts would intervene under current jurisprudence. There, it is fair to say that judicial intervention is unlikely, with at least one court declining to enforce a congressional rule enacted in a statute as a nonjusticiable political question[136] and a recent appellate decision applying a fairly strong version of the enrolled bill doctrine to refuse to determine whether the same version of a law passed both houses of Congress before one version was enrolled and submitted to the President.[137] Supreme Court precedent is somewhat murky and difficult to reconcile,[138] however, and it is made even more challenging because of the cutback in legislator standing.[139] Instead, I will address some of the normative issues raised by the possibility of judicial review of Congress' compliance with framework legislation.

In his influential article *Due Process of Lawmaking*,[140] Judge Hans Linde argues that review of legislation pursuant to the due process clause should primarily involve review of the process the legislature followed in enacting the law.[141] Some of those procedures, including the ones emphasized by Professor Clark in his work, are

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See also Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (finding that members of Congress did not have the ability to challenge the House rule in Court).

[135] The appropriate remedy in such a case is unclear. Perhaps the court would merely strike the provision that violated the framework rule. On the other hand, a court could not be certain that the law would have passed without that particular provision, so it could be argued that the entire statute would be void. These are the same questions analyzed in cases involving severance of one provision of a law found unconstitutional from the rest of the law, or in state cases involving single subject rules for legislation. See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* __ (4th ed. 2007 forthcoming) (discussing severance); id. at __ (discussing single subject rules).

[136] Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982).

[137] Public Citizen v. United States District Court for the District of Columbia, 486 F.3d 1342 (D.C. Cir. 2007) (applying the enrolled bill rule of *Field v. Clark* and dismissing challenge to Deficit Reduction Act).

[138] Compare Marshall Field v. Clark, 143 U.S. 649 (1892) with United States v. Munoz-Flores, 495 U.S. 385 (1990).

[139] See Raines v. Byrd, 521 U.S. 811 (1997). For a discussion of standing and other issues of justiciability in the context of framework legislation, see Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, __ U. Penn. J. Con. L. ___, Appendix on Justiciability (forthcoming 2008) [hereinafter Bruhl, *Line Item Veto*].

[140] 55 Neb. L. Rev. 197 (1975).

[141] Id. at 245.

constitutionally mandated, but others are internal rules adopted by the houses themselves and changed over time to reflect experience and new circumstances. As Linde describes them, "[T]he process everywhere is governed by rules, and these rules are purposefully made and from time to time changed and … most of them are sufficiently concrete so that participants and observers alike will recognize when a legislative body is following the due process of lawmaking and when it is not."[142] Linde argues that these rules should be the subject of judicial review, not just internal enforcement, to ensure that the legislature has complied with its procedure because they are crucial to the legitimacy of the laws and to the assurance that the legislature will act consistently with due process guarantees.[143] Although Linde does not specifically address statutized rules, he does note that important rule changes were adopted as part of the Legislative Reorganization Acts of 1946 and 1970, which contained provisions adopting internal rules for both houses as part of comprehensive statutes.[144]

Framework laws are important structures for the due process of lawmaking because they often serve purposes related to improving the deliberative process – solving coordination problems, entrenching important values that are apt to be overlooked because of decision making pathologies in a collective body, or providing neutral rules for decisions in the future that will be highly charged. Third-party enforcement of some sort might be particularly important with respect to the last two purposes – entrenchment and neutrality – because many lawmakers will be tempted to evade the procedures when their immediate interests in passing legislation outweigh their longer-term interest in the value that they sought to entrench. In the circumstances of federalism, a framework law like UMRA is justified in part because it constrains lawmakers from enacting substantial unfunded mandates in order to establish policies their constituents want while avoiding responsibility for funding those programs. Given the temptation to enact unfunded mandates in particular cases, legislators will try to avoid the bite of the disciplining framework; enforcement by the judicial branch could provide more teeth. Thus, due process of lawmaking seems to point strongly in favor of greater judicial involvement with respect to framework laws.

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[142] Id. at 242.
[143] Id. at 242-43.
[144] See Garrett, *Conditions*, *supra* note 6, at 294, 296 (relating these Acts to framework laws).

If, however, courts began to enforce some of the internal congressional rules using a due process of lawmaking rationale, several problems would arise.[145] First and most important, outside enforcement would be a strong deterrent to adoption of the frameworks in the first place. Although the effect of frameworks is not illusory, it is certainly true that lawmakers are more willing to put a framework in place because they understand that internal rules are less durable than other kinds of rules – statutory or constitutional. How Congress would react to increased judicial scrutiny depends on how far-reaching that scrutiny would be. If courts began to be more involved in ensuring compliance with any internal congressional rule – whether passed as a statute or through a wholly internal process – then Congress would presumably continue to use frameworks. In that case, just as now, nothing would be different depending on the form of rule adoption. However, it seems more likely that any increase in judicial review would be focused not on rules adopted in purely internal vehicles, but only on framework laws which have already involved another branch of government – the President – in their adoption. In that case, legislators might work to avoid using framework laws as much as possible, coordinating passage of multiple parts of a package in other ways. Judicial review will have only made it more difficult for Congress to achieve what it wants in the way that it wants without any corresponding increase in judicial review (as Congress circumvents the courts by eschewing the framework law format).

Thus, a uniform rule that courts will enforce framework laws is undesirable, but perhaps it would be attractive to lawmakers to have a choice: an option of a structure that provides for outside enforcement, and an option to continue with only internal disciplinary devices. Lawmakers could then decide what level of accountability they wanted to offer their constituents in designing the framework law.[146] Here, the key question is how can lawmakers reliable signal to courts that they want judicial review as an additional enforcement mechanism in some cases but not in others? Some courts might interpret the choice of the statutory form for adoption of internal rules as the signal

[145] Such enforcement would presumably come usually when a private party would challenge the validity of a law on the ground that Congress did not follow the relevant rules when it enacted the law. It would be harder to envision a challenge on the ground that a law that should have been enacted was not because of improper application of some rule, particularly given the stringent limitations on lawmaker standing.
[146] Cf. Ferejohn, *supra* note 54, at 140-41 (describing the accountability-discretion tradeoff that lawmaker-agents consider).

to encourage judicial intervention. That would be a mistake, not just because the statutes usually contain a disclaimer clause, but also because legislators primarily use the statutory form not to signal their desire for increased durability but to satisfy a need to enact all packages of a comprehensive reform in one legislative vehicle. Moreover, the absence of a disclaimer clause in a framework law should not be understood as a signal welcoming judicial review; it is more likely an oversight. Indeed, the disclaimer clause itself is typically phrased as a recognition of the principle that provisions in a statute affecting only the internal rules of one or both houses is an exercise of the rulemaking power and can be changed unilaterally and at any time by the relevant body. In other words, the disclaimer provision is not the same as a reserve clause; it is instead a statement of the default rule for statutized and other internal rules. I would propose, instead, a regime which allows Congress to explicitly opt in to judicial review of compliance with framework laws. Without an explicit provision in the text describing the scope of judicial review, the default should remain that courts are only minimally involved in cases involving internal rules. Otherwise, Congress is likely to retreat from framework laws entirely, using internal rules coordinated, if necessary, with statutory proposals enacting comprehensive reform. This consequence would be a negative development for the due process of lawmaking, without any corresponding advantages.

Of course, Congress will seldom, if ever, invite judicial enforcement. An express request for enforcement by third parties outside congressional control[147] is more likely for frameworks that are not apt to be triggered during the political tenure of the enactors. Most frameworks, however, will influence decision making in the short term, often within the same Congress that adopted it. Perhaps an issue will become so politically salient to voters that they will demand some credible signal of durability, beyond enactment as a statute, and in these cases Congress may decide to opt in to a system of judicial review. If this occurs, courts will be forced to face squarely the question of whether judicial review of a statutized rule is constitutional. The question will be framed

[147] Such third parties include courts and executive branch enforcers; Congress is more willing to allow enforcement by entities it has more direct influence over, such as the Congressional Budget Office or the Joint Committee on Taxation. For example, Congress attempted to vest sequestration, the most stringent enforcement of the budget process, in the General Accounting Office (GAO), and only switched that enforcement to the Office of Management and Budget when the Supreme Court ruled the delegation to the GAO unconstitutional. See Bowsher v. Synar, 478 U.S. 714 (1986).

differently than it has been in prior cases because the statute itself will indicate that Congress has asked for such third-party enforcement. Others have argued that judicial enforcement of internal rules, even those in statutes, would be unconstitutional,[148] although few have considered the possibility (perhaps because it is so unlikely) that review would be explicitly provided for.[149] Some case law suggests that the outcome of this constitutional question should not turn on whether Congress has given away some of its power to another branch, rather than tried to usurp the prerogatives of the executive or judicial branch.[150]

I leave the constitutional questions posed by judicial review of framework laws that expressly contemplate such review to others. From my perspective, the more interesting question is a practical one: Could a court determine in many cases whether the rule was followed or whether Congress had decided to waive or repeal the rule before enacting the statute? There would be many stages in the legislative process that a court would need to assess to reach an answer to that question. As we have seen, each house could repeal or modify a rule first adopted through a framework law through an internal resolution. Many points of order, although not those related to UMRA, are waived as a group in a special rule governing a particular bill. All these sources would have to be consulted to determine whether Congress had violated a rule or decided, as it has the power to do, to waive it through the appropriate procedure. Those procedures would not be uniform across all framework legislation. Some objections in the House can be waived in a special rules, some cannot[151]; some require a supermajority vote to waive in the Senate, some can be waived by a simple majority vote.

After consulting all these sources, the court's role, if such a role is constitutional, would be to ensure compliance, but this task is also fraught with difficulty. If both houses waived the rule in the manner provided for in the rules, then there is no rule to

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[148] See, e.g., Bruhl, *Using Statutes*, *supra* note 7, at 404-15; see also Miller, *supra* note 100, at 1364, 1374 (determining that judicial review would be constitutional but courts should refrain from review because compliance with procedural rules is a political question that courts should refrain from deciding).

[149] For an exception, see Bruhl, *Line Item Veto*, *supra* note 139, at __ (describing possible ways around current standing doctrine that seems to stand in the way of judicial review of one framework law, the Line Item Veto Act).

[150] See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998) (ruling Line Item Veto Act unconstitutional).

[151] See, e.g., *Metzenbaum*, 675 F.2d at 1286, 1288 (although finding the issue nonjusticiable, also suggesting that any objection had been waived in a special rule).

enforce. Provisions in framework laws do not require that waiver be justified in any particular way; they allow Congress to waive the objection and continue to consider the bill as long as the procedure, including any supermajority voting requirement, is followed. One danger of inviting judicial review of compliance with internal rules is that a court may impose some burden of reasonable explanation for a waiver.[152] Such a requirement would be inconsistent with point-of-order enforcement, which typically does not provide for much debate of the parliamentary objection. It might also be inconsistent with the purpose behind framework laws, such as UMRA, where Congress has determined that it does not want to prohibit enactment of unfunded mandated entirely, but it does want to allow a member the ability to disaggregate substantial mandates and force Congress, by majority or supermajority, to agree to impose them. In that way, the law ensures that lawmakers at least know of the provision, which may be buried in a complex omnibus bill, and can be held accountable by voters and interest groups for burdening the states and localities.

Other cases would involve a challenge to a law enacted by Congress on the ground that no objection was raised even though the law contained a provision subject to a point of order. Sometimes that inquiry would be straightforward. To consider an example from UMRA, if the CBO statement identified an unfunded intergovernmental mandate above the threshold and no lawmaker objected to its consideration on the floor, then arguably the court can fairly easily determine that the framework was violated. But what if the challenge is that CBO's estimate of the direct costs was too low, so that the law did not trigger the internal enforcement when it should have? Can a court appropriately second-guess the budget experts at CBO and re-evaluate the financial burden placed on subnational governments? Some of the determinations for the budget points of order are even more complicated, relying not only on complex estimating techniques but also application of congressional precedents. Not only does the process sound increasingly constitutionally problematic – as one branch begins to interfere in the

[152] In other contexts, the Supreme Court has reviewed the state of the legislative record to determine if the empirical basis on which Congress legislated was sufficient. See, e.g., Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (concerning the American with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (concerning the Violence Against Women Act). See also Philip P. Frickey & Steven Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707 (2002); Ruth Colker & James Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80, 83 (2001).

internal operations of another coordinate branch – but the questions posed are not those that a court is particularly competent to decide.

There is an argument, however, that some minimal level of judicial scrutiny might complement the role of the Congressional Budget Office in a framework law like UMRA.[153] To the extent that the decisions of an entity like CBO play a large role in determining the fate of programs important to legislators, then some pressure will be brought to bear on expert staff to tailor their estimates to allow lawmakers to achieve their objectives. The threat that a faulty CBO analysis might trigger limited judicial review of the congressional procedure used to pass the mandate might provide insurance against such an excessive politicization of its staff and decision making. Again, principal-lawmakers might want to explicitly allow for the possibility of judicial intervention as a mechanism to bind themselves from exercising inappropriate political influence over decisions that agent-voters believe should be made on the basis of expertise. Under this conception of judicial review, courts could be seen as serving a roughly analogous function in reviewing CBO statements in the course of assessing the congressional procedures used to pass intergovernmental mandates as they do in some cases reviewing agency rulemaking under "hard look" review. In these cases, judges require that agencies explain their regulatory decisions in a rational and logical way, but they do not necessarily substitute their judgment on the merits for that of the agency.[154] Similarly, the court would not revisit the actual computation of the direct costs of an unfunded mandate if a party claimed the mandate should have triggered UMRA protections, but it would assess whether the statement was supported by sufficient explanation. Although the notion of the court as a backstop to somewhat insulate the professional staff of CBO from inordinate political pressure has some appeal, the experience with hard look review in administrative law suggests that the judicial intervention would not remain minimal, and the benefits of the threat of judicial review could be outweighed by the disadvantages of judicial intervention in arenas where courts

[153] I appreciate Bob Rasmussen's insight on this point.
[154] See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 383 (1986) (describing this sort of "hard look" review of agency policy).

have little institutional competence.[155] Moreover, increasing the requirements for CBO's mandate statements would be burdensome for the staff dealing with many bills under substantial time pressure, a problem similar to that of ossification in the agency context.

Thus, whatever one's view of Professor Clark's argument that courts should aggressively enforce the constitutional provisions governing lawmaking as a way to safeguard federalism, judicial review of internal rules, including those adopted in statutory form, presents practical problems and potentially serious constitutional concerns. Understanding the role of framework laws – both the decade-long experience with UMRA and the promise of other federalism frameworks that would it more difficult for the federal government to preempt state laws or enact significant conditions of assistance unrelated to the purpose of the federal funding – is crucial for a fully-informed view of how lawmaking procedures interact with federalism. But beyond perhaps playing a role in statutory interpretation techniques as envisioned in the proposal for a preemption framework law, framework legislation is not an additional avenue for judicial involvement in this realm.

[155] Cf. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 Va. L. Rev. 1243, 1285-86 (1999).